

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

JOSHAWA A. SHINN

Plaintiff

v.

Civil Action No. 1:95cv328-D-B

KENNETH S. APFEL,  
COMMISSIONER OF SOCIAL SECURITY

Defendant

MEMORANDUM OPINION

Upon consideration of the file and record in this action, the court is of the opinion that the Magistrate Judge's Report and Recommendation should be approved and adopted. Having conducted a *de novo* review of the record, the objections of the plaintiff, the submissions of the parties, and applicable case law, the court is of the opinion that the Magistrate Judge correctly assessed both the facts and the law in reaching his conclusion.

. Factual and Procedural Background

On October 1, 1993, Mary Shinn filed an application for supplemental security income benefits on behalf of her son Joshawa, born December 7, 1986.<sup>1</sup> The Shinns alleged that Joshawa was disabled under the Social Security Act<sup>2</sup> due to a learning disability and behavioral

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<sup>1</sup>The record is unclear as to the precise year of Joshawa's birth. Some sources state that it is 1986, while others state 1987. One source which indicates that the year is 1986 is the letter of Thomas F. Adams, M.D., who states that he treated Joshawa on August 13, 1987. Transcript, p. 127.

<sup>2</sup>The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 changed the standard governing childhood disability claims under the Social Security Act. 42 U.S.C.A. § 1382c(a)(3)(C)(i). The new standard applies to cases, such as this one, where judicial review was pending at the time the Act was enacted. *Jamerson v. Chater*, 112 F.3d 1064, 1068 (9<sup>th</sup> Cir. 1997); *Dawson v. Apfel*, No. 96 Civ. 6023 (LBS), 1997 WL 716924, at \*2 n.4 (S.D.N.Y. Nov. 17, 1997). However, a claim that was denied under the prior standard should be reviewed under that prior standard because "[a]ny case that would have been denied under the prior standard would also be denied under the new [more stringent] standard." *Dawson v. Apfel*, No. 96 Civ. 6023, 1997 WL 716924, at \*2 n.4 (S.D.N.Y. Nov. 17, 1997) (quoting SSA Emergency Teletype

problems. The Social Security Administration (SSA) denied the application at the initial determination stage and upon reconsideration. On December 23, 1994, an Administrative Law Judge (ALJ) with the Office of Hearings and Appeals of the SSA decided that Joshawa was not disabled under the Social Security Act and therefore not eligible for supplemental security income benefits. On September 6, 1995, the Appeals Council of the SSA denied the Shinns' request for a review of the ALJ's decision. Accordingly, the ALJ's decision stands as the final decision of the Commissioner of Social Security<sup>3</sup>. In the action *sub judice*, the Shinns seek judicial review of the ALJ's decision.

The Shinns claim that the ALJ's decision was not supported by substantial evidence and that it was based upon an erroneous standard of law. Complaint, ¶¶ 5, 6. In his Report and Recommendation concerning this action, United States Magistrate Judge Eugene M. Bogen found that the ALJ's decision was supported by substantial evidence. Shinn v Chater, Civil Action No. 1:95cv328-D-B (N.D. Miss. July 16, 1997). In their objection to the Report and Recommendation, the Shinns argued that the Magistrate Judge's finding was in error. Plaintiff's Objection to the Report and Recommendations of the Magistrate Judge (Plaintiff's Objection), p.

1. The Shinns also argued that the Magistrate Judge failed to consider a number of their claims,

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No. EM-96-131 S III(a)(5) (recommending use of prior standard)). Therefore, this court will review the Petitioner's claim under the prior standard. To this the Plaintiff has no objection. Plaintiff's Objection to the Report and Recommendations of the Magistrate Judge, p. 2.

<sup>3</sup>The Shinns originally filed this action against Shirley S. Chater, who at the time of filing was the Commissioner of Social Security. Currently, Kenneth S. Apfel is the Commissioner of Social Security. Therefore, pursuant to the Federal Rules of Civil Procedure, Mr. Apfel is hereby substituted as the Defendant in this action. Fed. R. Civ. P. 25(d)(1).

specifically (1) that “the ALJ did not have an adequately developed record before him” because the consultive report on which he relied was “incomplete and out-of-date;” (2) that the consultant who wrote the report “was not a pediatric specialist, as is required by statute and regulations;” and (3) that the ALJ “assumed the role of a psychological expert in reaching his conclusions.” Plaintiff’s Objection, pp. 2-3. Lastly, the Shinns argued that their case should be remanded because “[a] new assessment is clearly needed in light of the more complete evidence that is now in the record.” Plaintiff’s Objection, p. 4. This court must determine whether to sustain or overrule those objections.

#### . Standard of Review

Reviewing the report and recommendation of a United States Magistrate Judge regarding a dispositive motion, the standard is *de novo*. Fed. R. Civ. P. 72(b). However, where such a report and recommendation concerns supplemental security income benefits, this court must pay deference to administrative rulings: “The findings of the Commissioner of Social Security, as to any fact, if supported by substantial evidence, shall be conclusive . . . .” 42 U.S.C. 405(g). As the Fifth Circuit has explained numerous times, “[t]he Commissioner’s decision is granted great deference and will not be disturbed unless the reviewing court cannot find substantial evidence in the record to support the Commissioner’s decision or finds that the Commissioner made an error of law.” E.g. Leggett v. Chater, 67 F.3d 558, 564 (5<sup>th</sup> Cir. 1995). Therefore, regardless of the *de novo* standard, this court must overrule a claimant’s objections to a Magistrate Judge’s report and recommendation if the underlying administrative findings are supported by substantial evidence and there was no error of law. “Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.” E.g., Hames v. Heckler, 707 F.2d 162, 164 (5<sup>th</sup> Cir. 1983). This court has no authority to reweigh the evidence, try the issues *de novo*, or substitute the judgment of the court for that of the administrative agency. Hames, 707 F.2d at 164.

. Discussion

. Substantial Evidence

The issue before the ALJ was whether Joshawa was entitled to supplemental security income benefits under the Social Security Act. At the time relevant to this proceeding, the Act provided that a child under age 18 was disabled for purposes of eligibility for supplemental security income “if he suffers from any medically determinable physical or mental impairment” of severity comparable to that which would disable an adult. 42 U.S.C. § 1382c(a)(3)(A) (1992). Comparable severity meant that the “physical or mental impairment(s) so limits [the child’s] ability to function independently, appropriately, and effectively in an age- appropriate manner that [the child’s] impairment(s) and the limitations resulting from it are comparable to those which would disable an adult.” 20 C.F.R. § 416.924(a) (1994). To determine whether a child suffered from such an impairment, an ALJ used the following procedure:

If you are doing substantial gainful activity, we will determine that you are not disabled and not review your claim further. If you are not doing substantial gainful activity, we will consider your physical or mental impairment(s) first to see if you have an impairment or combination of impairments that is severe. If your impairment(s) is not severe, we will determine that you are not disabled and not review your claim further. If your impairment(s) is severe, we will review your claim further to see if you have an impairment(s) that meets or equals in severity any impairment that is listed in appendix 1 of subpart P of part 404 of this chapter, in which case we will find you disabled. If you do not have such an impairment(s), we will do an individualized functional assessment and determine whether you are disabled.

20 C.F.R. § 416.924(b) (1994). The individualized functional assessment (IFA) was designed to

address the following “domains of development or functioning:” cognition, communication, motor abilities, social abilities, personal/behavioral patterns, and concentration, persistence and pace in the completion of age-appropriate tasks. 20 C.F.R. § 416.924d(c) (1994). After conducting the IFA, the ALJ would “generally find comparable severity” if the child was “functioning at the marked level in one domain . . . [and] functioning at the moderate level in another domain . . . ; [or] “functioning at the moderate level in three areas . . . .” 20 C.F.R. § 416.924e(c)(2) (1994).

Deeming an IFA necessary in this case, the ALJ found the following regarding Joshawa’s domains of development or functioning: moderate limitation in the two domains of personal or behavioral patterns and concentration, persistence and pace in the completion of age-appropriate tasks; less-than-moderate limitation in the domain of cognition; and no limitation in the three domains of communication, motor abilities or social abilities. Transcript of Proceedings Before the SSA (Transcript), p. 18. Accordingly, the ALJ found the following:

- (1) The claimant has never engaged in a substantial gainful activity.
- (2) The evidence establishes that the claimant has low average intellectual functioning and mild attention deficit hyperactivity disorder, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.
- (3) The evidence does not support the extent of functional limitations alleged on behalf of the claimant.
- (4) The claimant does not have an impairment or combination of impairments of comparable severity to that which would prevent an adult from engaging in substantial gainful activity.
- (5) The claimant was not under a disability, as defined by the Social Security Act, at any time through the date of this decision . . . .

Transcript, p. 19. Therefore, the ALJ concluded that Joshawa was not disabled under the Social Security Act and was not entitled to supplemental security income benefits. In making this

determination, the ALJ stated that he relied upon the record in this case, which included the following sources of evidence: (1) the report of a clinical psychologist who conducted a psychological evaluation of Joshawa in November 1993, (2) school records and teacher information, and (3) the testimony of Joshawa and his mother in a hearing the ALJ held on November 3, 1994. Transcript, pp. 17-19.

The question here is whether substantial evidence supported the ALJ's findings. While Joshawa's mother testified that his limitations relevant to several domains were extreme, there is ample evidence supporting the view of the ALJ. For example, Joshawa's teacher Margaret J. Snow completed a questionnaire addressing the domains of development or functioning and reached the following conclusions: (1) regarding communication, Joshawa rarely has difficulty understanding speech, rarely has to search for words, rarely has difficulty understanding spoken directions, and does not have problems communicating with others; (2) regarding motor abilities, Joshawa never has difficulty hopping, skipping, jumping, using steps, or throwing or catching a ball, and he has no physical problems keeping up with other students or limiting him at school; (3) regarding social abilities, Joshawa always likes to play with other children, rarely prefers to play or work alone, frequently gets along with classmates, frequently gets along with his teachers, and generally exhibits adequate social and interpersonal skills in the school setting; (4) regarding personal or behavioral patterns, Joshawa frequently demonstrates self-help skills, never demonstrates poor grooming, rarely requires adult assistance with self-help skills, never requires prompts to meet personal needs, and has "no major problems" with behavioral patterns that interfere with his adaptation to the school setting or require special supervision or intervention from others; and (5) regarding concentration, persistence and pace, Joshawa rarely has difficulty

staying on tasks, rarely requires prompts to stay on tasks, rarely needs teacher guidance to focus on tasks, can concentrate well, and has no problems with concentration, persistence or pace limiting his functioning in the school setting. Transcript, pp. 104-8. Regarding cognition, Ms. Snow's comments indicated some impairment. Transcript, p. 105. Indeed, Joshawa failed the first grade, the level at which Ms. Snow taught Joshawa. However, as part of the IFA, Joshawa was given an intelligence test on which he scored approximately ten points above a level which may indicate moderate impairment. See Transcript, p. 125 (stating Joshawa's full scale IQ is 85, "placing him at the low end of the Average range of intellectual functioning"); 20 C.F.R. § 416.924e(c)(2)(ii) (1994) (providing full scale IQ of 74 may indicate moderate cognitive impairment). Much of the evidence in the record revealed that Joshawa's primary problem was his behavior at school. Even Ms. Snow recognized this problem, stating,

Joshawa's behavior problems deal with lack of self control. He has the most problems with things like using glue or any items that intrigue him. He also has problems adjusting to new situations such as going to and coming from lunch, computer lab, etc. Since computer lab is less structured he has used materials inappropriately, slid across the floor, etc. But, this happens occasionally — not frequently.

Transcript, pp. 108. However, Dr. Lane reported, "While [Joshawa] was somewhat immature and displayed mild ADHD tendencies, he was pleasant, cooperative, and appeared motivated throughout the evaluation." Transcript, p. 126. Considering this and other evidence in the record, this court cannot say that the ALJ's findings were not supported by substantial evidence.

Incidentally, the Shinns argued that the ALJ "failed to give adequate consideration to the mother's evidence" and "failed to give proper weight to the reports of [Joshawa's] behavioral problems as reported by the child's teachers." Brief in Support of Plaintiff's Entitlement to

Supplemental Security Income (Plaintiff's Brief), p. 9. This court finds these arguments unpersuasive. First, the Shinns addressed the wrong issue. Whether the ALJ should have given weight to the evidence which favored the Shinns is irrelevant. The issue in this case is whether substantial evidence supported the ALJ's findings. Second, even if the issues the Shinns raised were relevant, this court disagrees with the Shinns' statements. The ALJ did consider the mother's evidence and concluded, "The evidence does not support the extent of functional limitations alleged on behalf of the claimant." Transcript, p. 19. As for the school records, this court finds that the ALJ gave them sufficient weight. Indeed, the ALJ spent a considerable portion of his opinion discussing those reports, Transcript, pp. 17-18, and he based his findings of moderate limitations in two domains largely on the reports. See Transcript, p. 18 (regarding personal/behavioral domain, stating "Although Dr. Lane considered the claimant's attention deficit hyperactivity symptoms to be mild, school records and teacher reports suggest a moderate limitation in this area.").

#### . Additional Claims

The Shinns also argued that the Magistrate Judge failed to consider a number of issues they have raised throughout these proceedings. In their objection to the Report and Recommendation, the Shinns label these issues "legal errors" committed by the ALJ. Plaintiff's Objection, p. 2. According to the Shinns, the legal errors were (1) that "the ALJ did not have an adequately developed record before him" because the consultative report on which he relied was "incomplete and out-of-date;" (2) that the consultant who wrote the report "was not a pediatric specialist, as is required by statute and regulations;" and (3) that the ALJ "assumed the role of a psychological expert in reaching his conclusions." Plaintiff's Objection, pp. 2-3. This court will

address each claim in turn:

. Whether the Consultive Report Was “Incomplete and Out-of-Date”

Regarding the claim that the consultive report was incomplete, the Shinns argued that “the ALJ should have required the consultant to address the claimants’ limitations in terms that would provide information needed by the ALJ to make an assessment of the Plaintiff’s ability to function in the five domains and one area of behavior listed in the regulations.” Plaintiff’s Brief, p. 12. However, the Shinns failed to direct this court to any authority supporting their argument. Whether the ALJ did what the Shinns feel he “should have” done is irrelevant. The questions in this case are whether there was substantial evidence to support the ALJ’s decision and whether the ALJ committed an error of law. This court held above that substantial evidence supported the ALJ’s decision. Further, this cannot say that the ALJ committed an error of law on the point the Shinns raised here.

Regarding the claim that the consultive report was outdated, the Shinns argued, “Many developments have occurred since the consultive examination was performed in this case.” Plaintiff’s Brief, p. 12. For reasons discussed below, this court finds no merit in this argument.

. Evaluation by Clinical Psychologist

The Shinns argued that the ALJ erred when he secured the services of James R. Lane III, Ph.D., a licensed clinical psychologist, to conduct a psychological evaluation and testing of Joshawa. The Shinns argued that by doing so the ALJ developed an inadequate record of facts because Dr. Lane was not “a pediatric specialist, as is required by statute and regulations.” Plaintiff’s Brief, p. 12. The Defendant responded that the Shinns offer “no proof that Dr. Lane was unable to adequately evaluate a child’s psychological ability. Dr. Lane performed the age-

appropriate testing for a child of plaintiff's age and appropriately assessed his ability based on the test results." Memorandum in Support of the Commissioner's Decision, p. 10. Regarding this issue, § 1382c(a)(3)(H)<sup>4</sup> of the Social Security Act provides as follows:

In making any determination under this subchapter with respect to the disability of a child who has not attained the age of 18 years . . . , the Secretary shall make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the disability of the child (as determined by the Secretary) evaluates the case of such child.

42 U.S.C. § 1382c(a)(3)(H) (1992). Accordingly, the question before this court is whether the ALJ made "reasonable efforts" to secure the services of "a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the disability of the child" to evaluate Joshawa's case.

As an initial matter, this court notes that the Shinns' statement of the law on this issue is incorrect. No statute or regulation requires a "pediatric specialist" to consult the ALJ. As the Social Security Act provides, the consultant need only be "a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the disability of the child." 42 U.S.C. § 1382c(a)(3)(H) (1992). Although a pediatric specialist may be qualified to assist the ALJ under § 1382c(a)(3)(H), a pediatric specialty is not required. As the statute provides, the individual may be one who specializes in a field of medicine appropriate to the disability of the child. Additionally, the statute only requires that the ALJ make "reasonable efforts" to ensure the services of such an individual.

That said, the question remains whether the ALJ followed the mandate of §

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<sup>4</sup>Pursuant to the 1996 amendments to § 1382c, the provision in § 1382c(a)(3)(H) has been moved to § 1382c(a)(3)(I).

1382c(a)(3)(H) when he secured the services of Dr. Lane to evaluate Joshawa's case. This court concludes that he did follow that mandate. In this court's opinion, the ALJ made reasonable efforts to secure the services of a qualified individual under the terms of § 1382c(a)(3)(H). It does not appear that Dr. Lane was a pediatrician. However, this court cannot say that Dr. Lane, a clinical psychologist, did not specialize in a field of medicine appropriate to the disabilities the Shinns asserted — a learning disability and behavioral problems. The Shinns offer this court no proof to the contrary.

#### . Assumption of Role of Expert

The Shinns argued, "No psychologist or other professional has made findings that support these conclusions by the ALJ." Plaintiff's Brief, p. 13. Therefore, the Shinns argued, "the ALJ erroneously sought to stand in the shoes of a psychological expert." Plaintiff's Brief, p.13. This court cannot agree. The report of Dr. Lane made numerous findings which supported the conclusions of the ALJ. For instance, Dr. Lane tested Joshawa's intelligence and concluded, "Test results indicate that [Joshawa] is functioning in the low Average range of intelligence and that he has comparable academic skills." Transcript, p. 126. Regarding Joshawa's behavior, Dr. Lane concluded that Joshawa

displayed mild ADHD tendencies, [but] he was cooperative and responded well to frequent prompting and reinforcement. He exhibited appropriate affect, no anxiety, and a cheerful mood. He talked fast at times and occasionally did not pronounce words clearly, but improved with modeling and reinforcement. . . .

Transcript, p. 125. Additionally, Dr. Lane discussed claims by Joshawa's mother that Joshawa experienced frequent conflicts with peers, is impulsive, and requires extensive assistance with personal hygiene and dressing. Transcript, pp. 124-25. Regarding these claims, Dr. Lane

concluded, “Ms. Shinn was extremely negative and she appeared to consistently exaggerate her son’s alleged problems. Thus, she did not impress me as being cooperative or as motivated to provide reliable information.” Transcript, p. 124. Therefore, this court cannot agree that no professional made findings supporting the ALJ’s conclusions. Substantial evidence supported the findings of the ALJ. The AJL did not assume the role of a psychological expert.

### C. Remand

Another issue the Shinns raised is that new evidence has surfaced since the ALJ’s decision. The Plaintiff proffered this new evidence in support of his petition for judicial review. Specifically, the Plaintiff argued as follows: “Since the last assessment, many school records have come into the record showing that the Plaintiff’s condition deteriorated until he became unable to function at school and eventually was institutionalized.” Plaintiff’s Objection, p. 4. The Plaintiff’s evidence consists primarily of reports detailing instances of bad behavior at Caledonia Elementary School, documentation of the Plaintiff’s expulsion from the Lowndes County School System, and a letter from an employee at Charter Behavioral Health System of Mississippi where the Plaintiff was diagnosed with and treated for Oppositional Defiant Disorder. Plaintiff’s Brief, exhibits “A” and “B.” Each piece of evidence arose after the ALJ’s December 23, 1994, ruling denying the Plaintiff supplement security income benefits.

When confronted with such new evidence, district courts are authorized in some instances to remand the case to the administrative agency: “The Court . . . may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” 42 U.S.C. 405(g). The court should remand if “there is a reasonable possibility

that the new evidence would have changed the outcome of the Secretary's determination had it been before him." Johnson v. Heckler, 767 F.2d 180, 183 (5<sup>th</sup> Cir. 1985) (quoting Dorsey v. Heckler, 702 F.2d 597, 604-5 (5<sup>th</sup> Cir. 1983)).

The Shinns' argument for remand fails because the evidence is immaterial under Fifth Circuit case law. As the Fifth Circuit explained in Johnson, "Implicit in the materiality requirement . . . 'is that the new evidence relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability *or of the subsequent deterioration of the previously non-disabling condition.*'" Johnson, 767 F.2d at 183 (quoting Szubak v. Secretary of Health and Human Servs., 745 F.2d 831, 833 (3<sup>rd</sup> Cir. 1984)) (emphasis added). "[I]t would be inconsistent with . . . principles of appellate review to remand the case solely for the consideration of what was correctly held to be a non-disabling condition." Id. Therefore, if substantial evidence supported the finding of no disability, then new evidence showing a disability is immaterial. As the Fifth Circuit explained in Johnson, the evidence may form a basis for a new claim, but it fails to form a basis for remand of the present claim.

Here, the Shinns proffered new evidence which may show that Joshawa's condition has deteriorated. However, whether his condition has deteriorated, even if to the point that he is now disabled, is not material if the ALJ properly determined that Joshawa was not disabled as of the time of the administrative ruling. As already stated, this court deems that substantial evidence supported the ALJ's decision. Therefore, new evidence arguably showing post-administrative-ruling deterioration is immaterial. The Shinns may have proffered evidence which could support a new claim for benefits. However, this court cannot remand the present claim because

substantial evidence supported the administrative agency's determination.<sup>5</sup>

#### IV. Conclusion

This court approves and adopts the Report and Recommendation of the Magistrate Judge affirming the Commissioner of Social Security's finding that Joshawa A. Shinn was not disabled under the Social Security Act at the time relevant to his application for supplemental security income benefits. Substantial evidence supported the ALJ's findings on this matter. The ALJ committed no error of law. Any new evidence in this case may form a basis for a new claim, but it fails to form a basis for remand of the present claim.

A separate order in accordance with this opinion shall issue this day.

This the \_\_\_\_ day of March 1998.

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United States District Court

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<sup>5</sup>The Plaintiff relies upon a recent Fifth Circuit decision in arguing that evidence arising after the administrative ruling should be considered on remand. However, the case the Plaintiff cites, Likes v. Callahan, does not concern evidence arising after an administrative ruling. Likes v. Callahan, 112 F.3d 189 (5<sup>th</sup> Cir. 1997). Although retrospective, the evidence in Likes arose prior to the administrative ruling. Likes, 112 F.3d at 190 (remanding because ALJ failed to consider evidence of prior medical diagnoses in which two mental health professionals opined that claimant had suffered from post-traumatic stress disorder since Vietnam War). In this case, on the other hand, the evidence the Plaintiff proffers arose after the administrative ruling. Therefore, Likes does not support the Plaintiff's argument.

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Civil Action No. 1:95cv328-D-B

KENNETH S. APFEL,  
COMMISSIONER OF SOCIAL SECURITY

Defendant

ORDER ADOPTING REPORT AND RECOMENDATION

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED that:

- (1) the Report and Recommendation of the United States Magistrate Judge Eugene M. Bogen dated June 16, 1997, is hereby APPROVED and ADOPTED as the opinion of this court;
- (2) the Objection to the Report and Recommendation filed by the Plaintiff is hereby OVERRULED; and
- (3) this case is CLOSED.

SO ORDERED, this the \_\_\_\_ day of March 1998.

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United States District Court